

HONG KIM SIME

a

v.

MALAYAN BANKING BHD

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
EDGAR JOSEPH JR FCJ
MOHAMED DZAIDDIN FCJ
[CIVIL APPEAL NO: 02-17-1996 (S)]
26 MAY 1999

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BANKRUPTCY: *Petition - Affidavits - Attestation - Whether justice of the peace may attest affidavit in bankruptcy petition - Bankruptcy Act 1967, s. 128(a) - Subordinate Courts Act 1948, s. 79(2) - Interpretation Acts of 1948 and 1967, s. 3 - Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, reg. 2*

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The sole issue in this appeal was whether a justice of the peace ('JP') was competent to attest an affidavit in a bankruptcy petition, having regard to s. 128(a) of the Bankruptcy Act 1967 ('the Act') which states that "Subject to general rules made by the Minister, any affidavit may be used in a bankruptcy court if it is sworn – (a) in Malaysia or in the Republic of Singapore before any person authorised to administer oaths in the High Court or any Magistrate". The petitioning creditor here had presented a bankruptcy petition in the High Court at Tawau, Sabah and the petition was verified by a JP in Sabah.

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Held:

Per Chong Siew Fai CJ (Sabah & Sarawak)

[1] Section 128 of the Act does not expressly include a JP nor can a JP come under the phrase "person authorised to administer oaths in the High Court" appearing therein. Further, the word "magistrate" is not defined in the Act. However, s. 128 is expressed to be "Subject to general rules made by the Minister".

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[2] By virtue of s. 3 of the Interpretation Acts 1948 and 1967 read with s. 79(2) of the Subordinate Courts Act 1948, the word "magistrate" in s. 128(a) of the Act includes a second class magistrate.

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- a* [3] Section 99(2) of the Subordinate Courts Act 1948 confers powers on justices of the peace in Sabah and by virtue of this provision, the Minister had made the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990. Regulation 2 thereto has the effect of authorising every JP in Sabah to administer oaths and affirmations and to attest signatures under any written law as though he or she were a second class magistrate.
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- c* [4] Therefore, reading s. 128(a) of the Act together with the meaning of the word “magistrate” as defined in s. 3 of the Interpretation Acts 1948 and 1967, s. 79(2) of the Subordinate Courts Act 1948 and reg. 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, a JP in Sabah is competent to attest an affidavit in a bankruptcy petition.

[Appeal dismissed with costs.]

d **[Bahasa Malaysia Translation Of Headnotes]**

- e* Satu-satunya isu dalam rayuan ini adalah mengenai sama ada seseorang jaksa pendamai (‘JP’) adalah kompeten untuk mengakusaksikan sesuatu affidavit dalam sesebuah petisyen kebangkrutan, menurut s. 128(a) Akta Kebankrutan 1967 (‘Akta tersebut’) yang menyatakan bahawa “Subject to general rules made by the Minister, any affidavit may be used in a bankruptcy court if it is sworn – (a) in Malaysia or in the Republic of Singapore before any person authorised to administer oaths in the High Court or any Magistrate”. Pemiutang mempetisyen di sini telah mengemukakan sebuah petisyen kebangkrutan di dalam Mahkamah Tinggi di Tawau, Sabah dan petisyen berkenaan telah ditentukan sahkan oleh seorang JP di negeri Sabah.
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Diputuskan:

Oleh Chong Siew Fai HB (Sabah & Sarawak)

- g* [1] Seksyen 128 Akta tersebut bukan sahaja tidak membuat peruntukan secara nyatanya bagi seseorang JP, malahan seseorang JP tidak boleh terlingkung di bawah frasa “person authorised to administer oaths in the High Court” sepertimana yang terdapat di dalamnya. Selanjutnya, perkataan “magistrate” tidak ditakrifkan di dalam Akta tersebut. Walaubagaimanapun, s. 128 dijelaskan sebagai “Subject to general rules made by the Minister”.
- h* [2] Berdasarkan s. 3 Akta-Akta Pentafsiran 1948 dan 1967 yang dibaca bersama-sama dengan s. 79(2) Akta Mahkamah Rendah 1948, perkataan “magistrate” dalam s. 128(a) Akta tersebut turut termasuk bagi seorang majistret kelas kedua.

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- [3] Seksyen 99(2) Akta Mahkamah Rendah 1948 memberi kuasa terhadap jaksa-jaksa pendamai di negeri Sabah dan berasaskan peruntukan ini, Menteri telah membuat Peraturan-Peraturan Mahkamah Rendah (Kuasa-Kuasa Jaksa Pendamai) (Sabah) 1990. Peraturan 2 di situ mempunyai penguatkuasaan dari segi pemberian kuasa kepada setiap seorang JP di negeri Sabah untuk mengendalikan sumpah dan pengesahan serta untuk mengakusaksikan tandatangan-tandatangan di bawah mana-mana undang-undang bertulis seolah-olah beliau merupakan seorang majistret kelas kedua. a
- [4] Oleh yang demikian, dengan membaca s. 128(a) Akta tersebut bersama-sama dengan maksud perkataan “magistrate” sepertimana yang ditakrifkan di dalam s. 3 Akta-Akta Pentafsiran 1948 dan 1967, s. 79(2) Akta Mahkamah Rendah 1948 dan peraturan 2, Peraturan-Peraturan Mahkamah Rendah (Kuasa-Kuasa Jaksa Pendamai) (Sabah) 1990, seseorang JP di negeri Sabah adalah kompeten untuk mengendalikan sebuah affidavit dalam sesebuah petisyen kebangkrutan. b
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[Rayuan ditolak dengan kos.]

Legislation referred to:

Bankruptcy Act 1967, s. 128(a)

Bankruptcy Rules 1969, r. 117

Interpretation Acts 1948 & 1967, s. 3

Justices of the Peace Ordinance 1961, s. 4(1)

Subordinate Courts Act 1948, ss. 78, 79(2), 99(2)

Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, reg. 2

For the appellant - Lim Pitt Kong; M/s PK Lim & Co

For the respondent - Lucy Lo Soo Fun; M/s Hiew & Chin

[Appeal from Court of Appeal, Kota Kinabalu; Civil Appeal No: S-02-13 of 1994]

Reported by Anne Khoo

JUDGMENT

Chong Siew Fai CJ (Sabah & Sarawak):

This appeal concerns only one question respecting which leave to appeal to this court was granted on 12 November 1996. The question is: Whether a justice of the peace in Sabah is competent to attest an affidavit in bankruptcy petition having regard to s. 128(a) of the Bankruptcy Act 1967 and the related legislations. In the instant case under appeal, the affidavit is one verifying a bankruptcy petition. e

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- a* Two other appeals are on the same issue *ie*, Appeal No. 02-18-1996(S) (between Goh Bun Kwee and Malayan Banking Berhad), and Appeal No. 02-19-1996(S) (between Yee Pak Kui and Malayan Banking Berhad). It has been agreed by all parties through their counsel that the decision in this appeal shall be binding upon those two appeals.

b ***Background Facts***

- Narration of the facts in this appeal would have to start with the respondent's/ petitioning creditor's bankruptcy petition because, save for the verifying affidavit made on 2 November 1993, the appeal record does not include any document made or filed earlier than the date of the said petition. On 4 November 1993 the petitioning creditor presented a bankruptcy petition against the judgment-debtor Hong Kim Sime (appellant) in the High Court in Tawau, Sabah, for failing to comply with a bankruptcy notice dated 1 March 1993 requiring the judgment-debtor to pay a total sum of RM422,976.86 (made up of a judgment sum, interest and costs) by 11 May 1993. The petition was verified by the affidavit attested by a justice of the peace in Sabah.

- By a notice dated 24 June 1994 taken out under r. 117 of the Bankruptcy Rules 1969, the judgment-debtor objected to the validity of the bankruptcy petition contending that the verifying affidavit in support, being attested by a justice of the peace in Sabah, was defective.

High Court

- In the High Court, the learned trial judge overruled the objection holding that a justice of the peace in Sabah being clothed with the power to administer oaths under s. 128(a) of the Bankruptcy Act 1967 (hereinafter referred to as the "Bankruptcy Act") was competent to attest the affidavit verifying the bankruptcy petition. In so deciding, the learned trial judge relied on s. 4(1) of the Justices of the Peace Ordinance 1961, reg. 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations, 1990, s. 79 of the Subordinate Courts Act 1948 and the Interpretation Acts 1948 and 1967.

Against the decision of the learned trial judge, the judgment-debtor appealed to the Court of Appeal.

Court Of Appeal

- The Court of Appeal agreed with the decision of the learned trial judge and dismissed the appeal with costs. On the point in issue, the Court of Appeal said:

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The effect of Regulation 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 is that in Sabah every Justice of the Peace ‘shall be authorised and is required to administer oaths under any written law ... as though he were a Second Class Magistrate’ ‘Any written law’ must in our view include the Bankruptcy Act.

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Federal Court

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Before us, counsel for the judgment debtor argued that a justice of the peace in Sabah could not be equated to a magistrate under s. 128(a) of the Bankruptcy Act and did not come under the deeming provisions of reg. 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulation 1990.

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Section 128(a) of the Bankruptcy Act enacts:

Subject to general rules made by the Minister, any affidavit may be used in a bankruptcy court if it is sworn:

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- (a) in Malaysia or in the Republic of Singapore before any person authorized to administer oaths in the High Court or any Magistrate;

And, reg. 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 provides:

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2. Every Justice of the Peace shall be authorised and is required –

- (a) to administer oaths and affirmations;
(b) to make and receive statutory declarations; and
(c) to attest signatures,

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Under any written law or when otherwise required to do so as though such Justice of the Peace were a Second Class Magistrate.

For the judgment-debtor, counsel further contended that the words “under any written law” in the said reg. 2 did not apply to s. 128(a) of the Bankruptcy Act and therefore a Justice of the Peace in Sabah could not come under the said section. As for the phrase “or when otherwise required to do so ...” in the said reg. 2, counsel argued that a Justice of the Peace in Sabah could not bring himself within that phrase because the said s. 128(a) did not specifically require him to administer an affidavit verifying a bankruptcy petition. He also submitted that the deeming provisions in the said reg. 2 could not apply to the word “Magistrate” in the said s. 128(a) unless there was an express provision in the Bankruptcy Act or in the rules made thereunder allowing the deeming provisions to operate. Counsel further stressed that a Justice of the Peace in Sabah was not a magistrate under s. 79(2) of the Subordinate Courts Act 1948.

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- a* In reply, counsel for the petitioning creditor submitted that although s. 128(a) of the Bankruptcy Act did not expressly include a Justice of the Peace in Sabah, it did not expressly exclude him or her either. He referred to the meaning attributed to the word “magistrate” in s. 3 of the Interpretation Acts 1948 and 1967 and contended that it included a 2nd class magistrate. He
- b* therefore submitted that, for the purpose of administering oaths and affirmations, a Justice of the Peace in Sabah was also a magistrate under s. 128(a) of the Bankruptcy Act.

- Admittedly, s. 128(a) of the Bankruptcy Act does not expressly include a Justice of the Peace in Sabah (or, for that matter, a Justice of the Peace generally), nor could a Justice of the Peace in Sabah, as such, come under the phrase “person authorised to administer oaths in the High Court,” in the said s. 128(a), and the word “Magistrate” is not defined in the Bankruptcy Act. However, it may be noted that the said s. 128 begins with the words
- c* “Subject to general rules made by the Minister,” and s. 3 of the Interpretation Acts 1948 and 1967 defines the word “magistrate” as:
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a magistrate appointed under any written law providing for the appointment of magistrates.

- The written law providing for the appointment of magistrates is to be found
- e* in ss. 78 and 79 of the Subordinate Courts Act 1948. More particularly, s. 79(2) thereof which provides for the appointment of second class magistrates reads as follow:

(2) The State Authority may appoint any fit and proper person to be a Second Class Magistrate in and for the State.

- f* Therefore the word “Magistrate” in s. 128(a) of the Bankruptcy Act includes a second class magistrate.

Now, s. 99(2) of the Subordinate Courts Act 1948 confers powers on Justices of the Peace in Sabah. It reads:

- g* (2) Justices of the Peace in Sabah shall have and shall exercise and perform such powers and duties as may be conferred or imposed upon them by any written law. They shall also have such other powers and duties as the Minister may by regulations confer or impose upon them and the
- h* Minister may confer or impose the said powers and duties upon all or any of the Justices of the Peace.

- By virtue of the above s. 99(2) of the Subordinate Courts Act 1948, the Minister had made the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990. Regulation 2 of this 1990 Regulations has been set
- i* out in full in the earlier part of this judgment. In the context of this appeal,

the effect of the said reg. 2, briefly stated, is to authorise and require every Justice of the Peace in Sabah to administer oaths and affirmations and to attest signatures under any written law as though he or she were a second class magistrate.

Hence, reading s. 128(a) of the Bankruptcy Act together with the meaning of the word “magistrate” as defined in s. 3 of the Interpretation Acts 1948 and 1967, s. 79(2) of the Subordinate Courts Act 1948, and reg. 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, we come to the conclusion that a Justice of the Peace in Sabah is competent to attest an affidavit in bankruptcy petition, more particularly, an affidavit verifying a bankruptcy petition. In other words the question posed for consideration in this appeal must be answered in the affirmative.

For the above reasons, the appeal is dismissed with costs to the petitioning creditor/appellant, such costs be taxed, if not agreed. Deposit to account of payment of the costs.

Since, the bankruptcy petition had already been struck out for reasons which are immaterial to this appeal and therefore unnecessary to be mentioned here, we make no order as to the validity of the said validity of the said petition. Furthermore, since parties in Appeals No. 02-18-1996 (S) and No. 02-19-1996 (S) had agreed to be bound by the decision herein, those two appeals are likewise dismissed with such consequential orders as to costs and deposits as we have made in this appeal.

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